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Supreme Court of the United States

OCTOBER TERM 1949

Number 260

JAMES SHEPPARD POTTS and
ADAM EMPIE POTTS,
Petitioners,

vs.

J. K. RADER, as Administrator, etc., et al,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

SUPREME COURT HAS POWER OF SUPERVISION

May it please the Court:

Your petitioners are not unmindful that while the Supreme Court of the United States has wide discretion and

full power of supervision in all matters where the highest state courts have departed from the accepted and usual course of judicial proceedings, or where such has been sanctioned by a lower court, this power will not be exercised by the Court unless there are present special and important facts or circumstances which, in the descretion of the Court, call for an exercise of such power of supervision (Rule 38); and especially in a case where a federal statute or a Constitutional question is involved. Rule 38. We respectfully submit that in the instant case every reason, both moral and legal, demands the exercise by the Court of its power of supervision.

Nearly seven years ago the exercise of this power was assumed to be necessary, where it had been brought to the attention of the Court that it was probable that the Supreme Court of North Carolina had so offended when passing upon the same federal statute here involved; namely, the Soldiers and Sailors Civil Relief Act, 50 USCA, Appendix § 521. As a consequence, a *certiorari* was granted, and the case of *Boone* v. *Lightner* (319 U.S. 561, 63 S. Ct. 1223, 87 L.Ed. 1587) was decided by this Court. In that case, while there was a dissenting opinion, there was no dissent by any member of the Court that the statute in question should be liberally construed in favor of the claimant, and that no soldier nor sailor would be deprived of the protection granted by the Act. The rule of construction to be applied is found in the concluding paragraph of the majority opinion, which reads as follows:

> "The Soldiers and Sailors Civil Relief Act is always to be liberally construed to protect those who have been obligated to drop their own affairs to take

up the burdens of the Nation. The discretion which is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial." (Italics supplied)

The opinion then goes on to state the limitation, and the only limitation involved, the Court saying:

> "But in some few cases absence may be a policy, instead of the result of military service, *and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.*" (Italics supplied).

The approved rule of construction here given has been re-expressed by the Court in two subsequent cases, namely *Fishgold* v. *Sullivan Corporation*, 328 U.S. 275, 292, 90 L. Ed. 1230,66 S. Ct. 904 and 1105, and *Fontaine LeMaistre* v. *Leffers*, 333 U.S. 1-6, 92 L. Ed. 433, 68 S. Ct. 371 the latter being cited in our original petition, page 26.

With the flat assertion by the Supreme Court of Arkansas (219 S.W. 2d 769, 771) that Colonel Potts was not entitled to the relief sought, it is respectfully submitted that, at the hands of this Honorable Court, he is at least entitled to a full review of the record of the Court below in order that this Court may reach a determination as to whether or not the facts justify the harsh ruling reflected in the opinion and decision in this cause; and to this end the writ of *certiorari* is sought.

A casual reading of the Arkansas opinion, without minute examination of the record in the case, would seem in and of itself to show a factual background entirely different from that present in the *Boone* case and in other cases which denied relief under the Act.

But before reviewing other cases may we point out to the Court certain alleged facts and circumstances found in the instant record, in order that the good faith of Colonel Potts may be weighed.

In our judgement, the only way to reconcile the action of the Arkansas court in the instant case with the holding of this Court in *Boone* v. *Lightner*, is to assume that the Supreme Court of Arkansas, when deciding the instant case, relied too heavily upon what was brought before it by one of the counsel representing the respondents in the lower court and now of counsel in this Court, namely, on unsworn Statement of A. F. Triplett, of Pine Bluff, Arkansas.

If the Court will examine the record filed in this Court, commencing at page 169, they will find a paper signed by Mr. Triplett, entitled *"Motion To Dismiss Under Rule Five"*. This paper, comprising fourteen (14) pages of the printed record, carries the following endorsement:

> Respectfully submitted,
> A. F. TRIPLETT
> *Attorney for appellees.*
>
> Filed *Sept.* 28, 1948. C. R. Stevenson, Clerk." (R. 182).

The record shows that this paper was not verified, as is required under Rule 3 of the Arkansas Supreme Court, which Rules require that all such motions be supported by affidavit and proof of service upon opposing parties. There is nothing in the record to show that paper was so served;

but, regardless of these several essential requirements, the time of filing is definitely shown, and such ante-dated the decision and opinion in this cause, and was before the court when the case was decided.

In our opinion, whether it is considered as a pleading or argument, or whether intended as a method of bringing before the appellate court of the State of Arkansas sundry allegations alleged as statements of fact, this paper is most remarkable!

As we read the record in the instant case we find not a scintilla of evidence which, in our judgment, could have justified the lower court in holding that our client, Colonel Adam Empire Potts, or either of his brothers, for that matter, was guilty of an attempt to use improperly the provisions of the Soldiers and Sailors Civil Relief Act, as held by the Arkansas court in this case, for the purpose of delay, nor as stated in the opinion in this case "for the purpose of delay, as it was in the Boone case, supra". Nor do we believe that, after a careful examination of the record in this case, this Court can reach the conclusion, held by the Supreme Court of Arkansas, "that the principal reason for the long course of this litigation lies in the efforts of the Potts brothers to delay its submission for adjudication".

It is inconceivable that litigants with so much at stake possibly could be trying to delay a case in which they have exerted every effort to bring such to *trial on its merits* and to show that the stranger claimants have no interest and no title whatever in any part of the property which is primarily involved in the case at Bar. We say *primarily* advisedly, because there is only one real issue involved; namely, the *ownership* of the Sheppard Island Estate. There is, of course, the secondary matter, of an accounting between

those who managed the property previous to the institution of the suit and since. Of course, after the death of A. E. Sheppard, uncle of the petitioners, and after the institution of the suit, incidental matters such as rental of the estate, had to be considered; and such were considered, with the approval of the petitioners, a receiver was appointed, etc. But all of these matters were incidental to the primary matter; i. e., the title and interest in the estate.

So also all reference to the Virgania litigation was foreign to the issues involved in this case. The Virginia court had nothing whatsoever to do with the property located in Arkansas, and it could not have. And counsel for the respondents knew this; yet time after time, the record shows that they drag this "red herring" across the trail; until, after a long last, for which they appear wholly responsible, they succeed in getting even the Supreme Court of Arkansas to follow *this false trail.* However, when so following such, the Court is led into the error of falsely repeating what actually was said or done by the Virginia court. Stranger still, the Arkansas Court misquotes the Virginia case so often referred to, and that to the prejudice of the petitioners. We quote from the last paragraph found in the opinion of the *Potts* v. *Rader* case, at Record page 187. It reads as follows:

> "The Virginia trial court dismissed at least part of that litigation upon a finding that the progress of the case was being intentionally delayed,*and its action was affirmed.* Potts v. Flippen, 171 Va. 52, 197 S. E. 422. There are other instances which we need not mention. We conclude that the record is wholly lacking in evidence to indicate that the chancellor abused his discretion in refusing to stay the proceedings." (Italics supplied).

From comparison it will appear that the Honorable Justice of the Supreme Court of Arkansas followed closely and accepted the statements found in Mr. Triplett's pleading, *Supra* (R. 172), at their face value, even to the extent of perpetuating the errors found therein; as will be observed from the report it gives of the *Potts-Flippen* case (171 Va. 52, 197 S. E. 422) where, instead of the finding being as related by counsel (Triplett) and adopted by the Supreme Court of Arkansas in the concluding paragraph of its opinion, the decision of the Virginia court was just the *reverse* of the alleged holding of the Virginia court so asserted by Mr. Triplett, *supra*, and adopted in the opinion of Justice Smith. We quote from the last paragraph of Chief Justice Hudgins' opinion in the *Potts-Flippen* case, commencing at page 60 of the Virginia Reporter citation:

> "These pleadings, the time of their filing and the long delay in the prosecution of the suit, are not sufficient in themselves to establish the conclusion reached by the trial judge. The trial judge found as a fact that the delay in prosecution of the suit and filing of the amended and supplemental bill for the purpose of 'impeding and embarrassing the administration of the estate herein involved.' The evidence on which this conclusion was reached is not now before this court. *In the absence of such evidence we can not determine whether or not the trial court abused its judicial discretion in dismissing the case.* This is simply the application of the principle stated in the cases cited in support of respondents' motion to dismiss."
> (Italics supplied).

Again it will be observed that an effort was made by counsel for the respondents in the Arkansas court to prevent a hearing upon the merits of the case now considered, under existing Rule Five in that State; and yet, at the same time, said counsel was using every means in his power to prevent the evidence bearing upon the good faith of these litigants to become a part of the record in the case. It was only after persistent effort through *certiorari* that the petitioners herein were even permitted to file the transcript of the testimony in the Supreme Court of the State of Arkansas, as disclosed in the record at page 182. Even after the court granted this relief to petitioners, the court receded from such *per curiam* order entered on October 18, 1948 (R. 182), and granted the relief sought by Mr. Triplett in the so-called Motion to Dismiss (R. 169), as will be observed from the opinion under review (R. 185).

Review of Cases Cited by Respondents

In our original brief, at page 26, we called attention to the numerous cases cited in Federal Code Annotated, expecting that our opponents would cite any case they might find which they considered justifying or tending to support the holding of the Arkansas court.

In their response brief, on page 5, the respondents have used quotations purporting to be citations from *Glick Cleaning and Laundry Company* v. *Wade*, 206 Ark. 8, 172 S.W. 2d 929, and from *Brown Service Ins. Co.* v. *King*, 247 Ala. 311, 24 So. (2) 219; but we have read these cases carefully and find no language in the cases cited which sustains in the least respect the opinion in the instant case. These cases employ no such language as that cited in above cases as quotations.

In the *Glick-Wade* case, *supra,* the Laundry Company alone had appealed; and there was no relation between it and the service man, who was not considered a party to the appeal; the court held that appellant is protected; sufficiency of the bond is not questioned; no party is prejudiced by denial of continuance.

In *Brown Service Ins. Co.* v. *King, supra,* a stay of proceedings was granted the service man, as he was "materially affected by reason of his military service"; with the following observation by the Supreme Court of Alabama, and citations, in all of which cases the stay of action was granted the service man:

> "The Act must be liberally construed for the benefit of the service man." *New York Life Ins. Co.* v. *Litke,* 180 Misc. 297; 41 NYS (2) 526; 181 Misc. 32; 45 NYS (2) 576.
>
> *Nassau Savings & Loan* v. *Ormond,* 179 Misc. 447; 39 NYS (2) 92.
>
> *Courtland Savings Bank* v. *Ivory,* 27 NYS (2) 313.
>
> "The General purpose of the Act was to protect those in military service and to prevent injury to their civil rights during their term of service arising from judicial proceedings conducted against them in their absence. It was intended to relieve persons in military service from mental distress occasioned by the handicap of being in service, resulting in inability to meet financial and other obligations; and to foster a mental repose through the intervention of courts to the end that such rights and remedies shall not be imperiled in consequence of military service."

In *Ridley* v. *Young,* 64 Cal. App. (2) 503, 149 P. (2) 76, was involved a police regulation, not to be evaded. Defen-

dant was not present at the accident but admitted he owned the car, making him jointly liable under California law. This was admitted in his deposition, which was on file; his liability was established, and the court properly held his rights were not materially affected by denial of continuance.

In *Hunt* v. *Jacobson,* 33 N.Y.S. (2) 661, at pages 662 and 665, it is shown that the service man (Janpole), an attorney, had been served with notice, had filed no answer, had made no application for a stay of proceedings, and appeared to be "only a nominal party to the action"; hence, no prejudice could result to him from denial of stay of action. The court recognized the principle involved and says:

> "(1) Statutes enacted for the benefit of persons engaged in military service are a recognized institution in this country, and, being remedial, are to be construed liberally * * * possessing as they do, attributes of privilege and exemption; and it has been held that, even in the absence of such a statute, *public policy demands the recognition of such exemption.*" (Italics supplied).

On page 6 of respondents' brief there is a quotation apparently taken from the opinion in the case of *Semlar* v. *Oertwig,* 234 Iowa 233, 12 N.W. (2) 265; but the respondents have omitted the concluding clause of the citation, which says:

> "doubtful cases should be resolved in favor of the litigant in the service."

In this case the Iowa Supreme Court granted a stay of action "until such time as the military service of appellant, Oertwig, does not materially affect the defense of the appellants." In commenting upon the *Boone* v. *Lightner*

case (319 U.S. 561) and also *Glick Cleaning and Laundry Co.* v. *Wade* (Arkansas, 172 S.W. 2d 929) the Court analyzes the different circumstances appearing in each case. Referring to the Soldiers and Sailors Civil Relief Act, the Iowa opinion states:

> "(7—8) The statute being an Act of Congress, we will be guided by the decisions of the highest federal courts in their interpretation of its various provisions. It is our conclusion that these decisions and the preponderant weight of the decisions of the state courts are against the grounds urged by the appellees, and held by the court, for denial of the continuance.
>
> (10—12) It is quite generally held that the granting or refusal of a motion for continuance is discretionary with a court, but this presupposes the exercise of a sound judicial discretion, to the end that, so far as possible. injustice will be done to no party. This is particularly true where a refusal to grant the stay prevents the personal participation of a party in the trial, and, in substance, denies him his day in court. The expressed purpose of this Act, and the construction put upon it by both state and federal courts, make it clear that, in refusing a stay, a court should be very certain that its decision, in the individual case, is not defeating the purpose of the Act. . . . We therefore hold that the motions of the appellants should have been granted as to each defendant until such time as the military service of appellant (Oertwig) does not materially affect the defense of the appellants. Reversed and remanded."

(The same general thought is covered by a former opinion

of the Arkansas court in the case of *Reynolds* v. *Haulcroft* 205 Ark. 760, 170 S.W. 2d 678), referred to by us in our opening brief, at page 26).

Tolmas v. *Streiffer* (La.) 21 So. 2d 387 (Mch. 12, 1945), was an action to recover premises on expiration of lease. The Soldiers and Sailors Civil Relief Act was held inapplicable to the circumstances of that case.

In *Isaacs* v. *Isaacs,* 37 N.Y.S. (2) 527, at 528, cited by respondents at page 6 of their brief, the Court held:

> "If it should appear at any future stage of the proceedings that the defendant's rights may be prejudiced as a result of non-availability due to his military duties, resort can be had at such time to the protection afforded by the Statute." New York, Military Law, Sec. 304. See also 36 N.Y.S. (2) 651, where stay previously was granted to this same serviceman, a "defendant in military service and not available."

Kelly v. *Kelly,* 38 N.Y.S. (2) 344, cited by respondents, a case under New York Statute, deals with support of infant children:

> "An Army man has his national obligations and obligations to support his children, and courts when asked to stay an action against an Army man for *support of his children* are called upon to exercise a *sound discretion,*" (Italics supplied).

> "The federal statute for the civil relief of Soldiers and Sailors was not intended to be applied without restrictions nor to be used as a means of abuse. Soldiers and Sailors Civil Relief Act, 1940, Sec. 203, 50 U.S.C.A. Appendix Sec. 523."

Surely, these cases found in the respondents' brief add nothing to the opinion of the court. We wonder why they were cited at all by opposing counsel, as they are not in point except where they lend support to the petitioners' case, such as the Iowa decision in *Semlar* v. *Oertwig,* supra, and other cases reviewed.

Respondents have not cited a case nor an authority which would support the decision of the Arkansas court in the instant matter.

It is only too obvious that the reason why respondents have not cited cases resting upon *Boone* v. *Lightner* is due solely to the fact that *no case is to be found* which supports or justifies any conclusion that the *Boone* v. *Lightner* case is a bar or barrier to this Honorable Court in affording to the petitioner the relief for which he prays and to which he is entitled under the provisions of the Soldiers and Sailors Civil Relief Act of 1940 and amendments.

We had wondered whence came the quotations found in respondents' brief, until, when reading the Triplett paper, we found in the record, at pages 173-174, that the same inappropriate cases had been furnished the Supreme Court of Arkansas also!

One of the most significant circumstances found in the record in this connection is carried in the 5th headnote found in the opinion, which reads as follows: (R. ~~158~~. 185

> "We need not pass upon the question of whether the chancellor should have ordered a division in kind instead of partition by sale. Most of the evidence on that issue was taken before the entry of the order of November 1, 1947, by which the chancellor refused to vacate his earlier decree. The transcript of that

testimony was not filed here until October 20, 1948 —long after the time allowed by our Rule 5. We therefore sustain the motion to strike this testimony from the record and without it we must assume that the evidence supported the chancellor's action."

From this it will be observed that, while the court had before it the transcript of the lower court (R. 182), they declined to consider the testimony taken expressly for use in the appeal (R. 150-151); apparently sustaining the motion of Triplett (R. 169), which in itself had failed to comply with a far more important rule of the Supreme Court of Arkansas, namely, Rule 3, requiring that no pleading shall be admitted or considered unless supported by affidavit and proof of service upon opposing parties. And still more significant in this connection is the *use* made by the court of this discarded testimony, when holding (under the first headnote) that the petitioners were estopped from claiming under the will of their ancestor, James Sheppard, because, in the language of the court, "Only the beneficiaries of the will could complain of the executors' failure to carry out instructions, but they accepted the deed and recognized its validity, as has the whole family for over sixty years." This is the very point which petitioners are contesting, and it constitutes the whole issue in this case.

This Court can hardly say that the discretion of the lower court was not abused where the record, without denial, shows that the applicant for relief here, under the Soldiers and Sailors Civil Relief Act, never was given an opportunity to present his testimony in the case, and yet, such Court holds, that title to real estate may pass by equitable estoppel, without giving the party an opportunity to testify concerning the facts upon which such estoppel is based. In so holding, the

Court through the application of Rule 5, tosses out of the window such evidence as was introduced by the two brothers of Colonel Potts, and then fails to afford Colonel Potts the privilege of testifying as to his knowledge of the facts involved, upon which such estoppel is predicated. (R. 185).

And, to show how casual, if not careless, the Court was, the opinion (R. 185) recites that "throughout this litigation both appellants have asserted an interest in the property under their *mother's will.* She was a grantee in the Executor's deed and derived her title from it. The appellants cannot claim title to part of the land in reliance upon the deed and at the same time claim the rest upon the theory of invalidity." (Italics supplied).

The record shows that the mother departed this life intestate (R. 2 and 139). With the fallacy, the conclusion is void.

Fee simple title to real estate can pass only by deed or will; not by estoppel (our original petition, p. 13). The learned Judge in the case under review cites in support of the proposition stated above *Wood* v. *Haye,* 206 Ark. 892, 175 S.W. 2d 189. This case did not involve fee simple title to real estate but merely a description in a mining lease. The authorities to the contrary are overwhelming.

Further, from an examination of aforesaid "Motion to dismiss" (R. 169-182) and a comparison of such with the opinion rendered in this cause by the Arkansas Supreme Court (R. 184-187), it appears that the appellate court there has completely disregarded the record when seeking the facts in this cause and has patterned its decision and opinion largely according to the views and misstatements found in the unsworn paper in that motion by "A. F. Triplett, attor-

ney for appellees," It is submitted that even a casual reading of the opinion of the Arkansas Supreme Court, with a parallel reading of the Triplett paper, will impress this Court as to such adoption.

From the concluding paragraph of its opinion in this cause (R. 187), it is evident that the decision of the Supreme Court of Arkansas was influenced, consciously or unconsciously, by A. F. Triplett's misstatement of the Virginia litigation (which properly had no place whatsoever in the instant case). (See Record page 176.)

It is remarkable that respondents have ignored the one outstanding case which these lawful heirs have succeeded in bringing to trial on the merits (and *by such trial they have prevailed*), the case in Virginia of *Potts* v. *Rader* (179 Va. 722, 20 S. E. 2d 690), which, in fact, was a combination and culmination of all the Virginia suits, where litigation in that State was decided in favor of the petitioners herein. Yet, in the "motion to dismiss", *supra*, Mr. Triplett has avoided any mention of this important and relevant Virginia case, as also has the Arkansas court. If the unrelated litigation of a foreign State was to be so brought into the record, it would seem that this case also would have been included.

In an apparent effort to influence the Arkansas court while considering and acting upon the appeal therein, the opening paragraph of the Triplett "motion to dismiss" shows an attempt to reflect upon petitioner James Sheppard Potts, alleging that he "had gotten all the rents for 1936, without

accounting to the other owners, and that unless a receiver should be appointed, the same result would occur in 1937." A statement of such nature, inserted in an unsworn statement filed in the appellate court, could have been inserted for one purpose only; i. e., to prejudice the court, solely to influence the appellate court in passing upon the good faith of a litigant.

The record shows respondents were well aware that James Sheppard Potts voluntarily always had made a full accounting and disbursement of all rents and revenues collected by him and that said accounting was filed as an exhibit to his answer in this cause (R. 10-12), although lawfully he could not be required to make such accounting. Mr. Potts is sustained further by the uncontradicted testimony of S. L. Pake, the respondents' own witness, who testified that "Mr. Potts advanced money to repair the houses and buildings" (R. 133). Yet, despite said full accounting and the further proof by respondents' own witness, the record shows large sums withheld from James Sheppard Potts, on the false pretext of indebtedness, and confirmation of same in the decree entered by the trial court on September 2, 1947 (R. 108).

According to the record, and according to respondents' own admissions in the record, of delays not attributable to Mr. Potts (R. 178 and 180), just *what* delays were attributable to petitioner James Sheppard Potts or his brothers? The answer is that *no delays* were attributable to any of the petitioners herein but that every delay in this litigation appears to have been due to the influence of counsel for the respondents, who has had control of the litigation in Arkansas from the start.

The foregoing is an example of the unfair tactics employed by the respondents herein.

On page 2 of their response brief, the respondents make the bald statement naming the three Potts brothers as plaintiffs in a Virginia suit attacking the alleged "will" of A. E. Sheppard, which statement, of course, is incorrect—and such certainly had no place in the instant suit, except in the persistent attempts of respondents, to confuss the issues here, as in the lower court, to the prejudice of the petitioners. The estate of A. E. Sheppard has nothing whatever to do with the instant suit, which concerns only the Arkansas estate of his father, James Sheppard, grandfather of the petitioners herein.

At page 3 of their brief, respondents state that this cause was instituted in 1937 and was "actively litigated" from that time. Yes, this is true, as it was very actively litigated *among the respondents themselves* in their private controversy as to which of them should receive the major portion of the property belonging to the petitioners. This internal strife was not settled among themselves until late in 1941 (R. 40). Yet, with this fact undisputed, and the record showing the other delays caused by the respondents, we find Mr. Tripltt telling the Supreme Court of Arkansas that Colonel Potts and his brothers are responsible for a delay of *eleven years* (R. 171) in bringing this suit to a close; and the worst of it is, that he put this over to the Supreme Court of Arkansas (R. 186).

If this Honorable Court will read the opinion of the Arkansas court (R. 187) as parallel with the Triplett paper (R. 176), it will see very plainly the impression produced.

The internal strife among the respondents was known as *Sheltering Arms, etc.*, v. *Shinberger*, 201 Ark. 780, 146 S. W. 2d 921, a suit seperate and independent of the instant cause, and decided adversely to Triplett's client. It had

no bearing whatever on the rights and claims of the petitioners herein.

Colonel Potts Not Represented By Counsel

There is nothing in the record to show that Colonel Adam Empie Potts ever was represented by counsel in the trial court (except as accommodation, to plead his military service and exemption) nor that his interests would not be prejudiced by perm tting this matter to proceed in his absence in military service—but *exactly to the contary* (R. 124; 143; and R. 47-48; 114; 141; 143; 145; 147); and Colonel Potts is not "still trying to obtain an extension of time" but is asking this Honorable Court for a writ of *certiorari*, to enable him to bring this matter to trial *upon the merits of the cause* at the earliest possible moment. It never has come to trial on its merits concerning the estate of James Sheppard, and such trial is what the petitioners now are asking.

Due Process of Law

On page 4 of their brief, we sse again respondents' attempt to inject into even these proceedings in the Supreme Court of the United States the motion which they made in the Arkansas court and by which they again attempt to deprive petitioners of their inherent right to due process of law and to the equal protection under the law to be had by trial on the merits of this cause.

This motion to Dismiss under Rule Five was totally improper and, we contend, should not have been considered by the Supreme Court of Arkansas, as the entire record and its procurement were under the control of the *Arkansas courts*

and were in the possession of the courts. The petitioners had no control over such. Appeal was taken in ample time and writs of *certiorari* issued properly for the *"full, true and complete* transcript of the record and proceedings" (R. 159 to 166), commands which the clerk and the reporter of the trial court could not lawfully ignore; and the Supreme Court or Arkansas erred grievously in arbitrarily placing the fault upon the appellants (petitioners herein), who at all times were making every effort to get the record *in its entirety* bofore said court. The testimony withheld by the clerk and reporter of the trial court was the very testimony taken *expressly for use in said appeal,* which is shown by the record (R. 150-151).

On the first writ of *certiorari,* the clerk's return made excuse for *not* making out and certifying the transcript (R. 160). On the second writ of *certiorari* the clerk wrongfully certifies "that I have made out and certified a full, true and complete transcript of the record and proceedings in said cause, which is hereto attached" (R. 161-162). Upon appellants' discovery of the errors and omissions a third writ of *certiorari* was issued to said clerk, whose return then admitted he had *not* supplied the 'full, true and complete transcript", and attempted to excuse and cover up his dereliction by an alleged "certificate" (not verified) from one "Jack Segars, Official Reporter of the Jefferson Chancery Court", with the startling and unbelievable statement that he had been *ordered to omit the very testimony which he, as court reporter, knew was taken expressly to be used in said appeal!* (R. 163) In said "certificate" he asked for an extension of time within which to file the transcript, and it was *granted* to him *by the Supreme Court of Arkansas.* That was July 12, 1948; and after a *fourth* writ of *certiorari* (R.

166), the record shows it was filed October 20, 1948 (R. 185)—after A. F. Triplett, counsel for appellees, on September 28, 1948, had filed his motion to dismiss under Rule Five (R. 169-182)—and thereby afforded the Arkansas Supreme Court an excuse to dismiss petitioners' cause.

Ancestral Estates in Arkansas

It is generally known and well established that, under Arkansas statutes of descents, only persons of ancestral blood may inherit an ancestral estate, defined as follows:

"Land is to be considered an ancestral estate within statute of descent and distribution, when it comes by gift, devise or descent either mediately or immediately from father or mother, or from any person in their respective lines." *Webb* v. *Caldwell,* 198 Ark. 331; 128 S.W. (2) 691; 122 A.L.R. 814.

"The purpose of the statute creating ancestral estates was to keep such estates in the line of the blood from whence they came, and blood must be the only consideration by which they are acquired". Pope's Digest 4347 (Arkansas).

The will of James Sheppard shows very definitely his full intention that only those of his own blood shall receive the proceeds and benefits of his life's labors. This is emphasized in the opinion rendered in a suit in the Supreme Court of Appeals of Virginia, in the case of *Potts* v. *Rader,* 179 Va. 722, decided in favor of these Potts heirs of the Sheppard family. The opinion in the case written by Justice E. W. Hudgins, now Chief Justice of the Virginia Court, says:

"The intent of a testator must be collected from the language of the will examined as a whole, giving force and effect to every clause".

"In construing a will, it is not to be presumed that the testator used an unnecessary word or one to which no force could be given."

The court held 'That the first class of remainders created by the will was contingent upon the death of the life tenants with *issue* surviving and if this condition was not fulfilled there was a gift over, and at the death of the last survivor without *issue* his share of the property descended to the heirs of the other beneficiaries." (Italics supplied).

"Numerous decrees have been entered construing the will, dividing the property and distributing the income. Some of the decrees construing the will seem to be conflicting. Under these circumstnaces, we approach the solution of the question involved, first, by attempting to determine the intent of the testator from the will itself, independently of the decrees entered in the cause."

"The intention of the court in drafting the decree is not the dominant factor. The intention of the testatrix is the mater of vital concern."

"The intent of the testatrix is the polar star for the guidance of the court. This intent must be collected from the language of the will examined as a whole, giving force and effect to every clause. It is not to be presumed that the testatrix used an unnecessary word or one to which no force can be given. Harrison on Wills, Sec. 185; *Shepard's Heirs* v. *Shepard's Estate*, 60 Vt. 109; 14 Atl. 536.

It appears that all Arkansas cases have been determined and decided in accordance with this principle, as evidenced by the case of *Jackson* v. *Robinson*, 195 Ark. 431-435; 112 S. W. 2d 417, at 419, wherein the Supreme Court of Arkansas, in its opinion, cited:

"All of our cases are to the effect that the object in construing wills is to ascertain the intention of the teatator. This must be done from language used as it appears from a consideration of the entire instrument, and when such intention is ascertained it must prevail, if not contrary to some rule of law, the court placing itself, as near as may be, in the

position of the testator when making the will". *Witten* v. *Wegman,* 182 Ark. 62; 30 S.W. (2) 834.

The opinion of the court continues: "If it had been the intention of the testator to give her (his wife, who was co-executrix) the property in fee simple, there would have been no necessity to say that she might have power to sell jointly with the executor. If the property had been given to her in fee simple, there would be no reason to say anything about her power to sell. She would necessarily have had that power. But when the testator stated that she, jointly with the executor (A. W. Jackson) had power to sell, it *necessarily* meant that she was given a life estate with power to sell, jointly with the executor."

This bears out the principle also that the failure of a devise to a class, by decease of one or all of its members, vests the legacy or devise in the *survivors* of the next *class* of *nearest kin* to the original testator.

The said respondents, by the very nature of their response brief, actually and substantially admit the validity of petitioners claim to ownership in its entirety all of Sheppard Island Plantation, in Jefferson county, Arkansas, title to which property is the subject of this suit.

By their own arguments, respondents admit the invalidity of the "deed" attempted by one B. F. Richardson; and the respondents themselves attempt by *surmise* to show some way by which title may be passed to them as strangers.

"The land goes to the heir at law".

"Courts are not at liberty, in the absence of words showing such intent, to presume the testator intended to pass the lapsed lands away from the heir".

Galloway v. Darby, 105 Ark. 558, 151 S.W. 1014; 6 Paige Ch. (N.Y.) 611; 1 Willes Rep. (Eng. Ch.) 296; 3 Harr. & McHenry (Md.) 333; 4 Paige Ch. (N.Y.) 117; 13 How. (U.S.) 390; 86 Pa. St., *Yard* v. *Murray*; 1 Swanst. Eng. Ch. 570; 23 N.Y. 312; 79 N.Y. 346; 62 Oh. St. 414; 2 Blackstone 737; 6 Conn. 304; 36 Pa. St. 113; 3 Munf. (Va.) 77; 62 Conn. 142; 94 Md. 463; etc. "The doubt shauld be resolved in favor of the the heir at law". 18 How. (U.S.) 300; 16 Vesey Jr. 451; 1 Hill Ch. (S.C.) 96; 19 Oh. 334. "On lapse of devise, property goes to residuary legatee and not to the heirs". 51 Ark. 61—etc.

"It becomes no man and no court to be wise above that which is written", said Judge Sharswood, 64 Pa. St. 9.

In the entire record and in their own response brief there is not one place where the respondents have shown that they have any title or anv interest in this Sheppard Island Plantation.

The record shaws (R. 170, line 28; 185) that respondents and the Arkansas Supreme Court admit the invalidity of the alleged "deed" whereby one B. F. Richardson attempted to convey this Sheppard Island property to the widow and children of James Sheppard.

It is not contradicted that said attempted "deed" was void and that said widow and children of James Sheppard accepted a life estate only; as to them the legacy lapsed.

And the decease of A. E. Sheppard, last of the children of said James Sheppard, ended the class in being in 1870 at the time of the decease of said James Sheppard; and upon decease of said A. E. Sheppard, in 1934, the grandchildren

of said James Sheppard immediately took fee simple title and took possession and control of said Sheppard Island Plantation and never have relinquished such title nor possession of said property. There have been *no laches* and *no acquiescence* on the part of these the lawful heirs.

Nothing in the record shows that James Sheppard had any intention to disinherit his grandchildren as his heirs; but the record *does* show that James Sheppard's full intention was to privide for the "descendants" of his children, to benefit those of his own blood, and them only.

Nothing in the record shows that the respondents have any interest nor title in or to any of the property devised by said James Sheppard; but the entire reecord *does* show that the respondents, with no title and no interest whatever, have attempted to *assume* ownership and upon this assumption to demand a partition suit, their attempt to take over this entire property through a "partition sale" to "purchasers" of their own choosing and upon their own terms and for their own advantage and profit, to divest these lawful heirs completely.

Conclusion

Upon a review of the facts and circumstances appearing in this record, we respectfully submit that the Supreme Court of Arkansas should not have denied—but welcomed—an opportunity to review the action of the lower court upon its merits, and that a denial by the Supreme Court to consider any portion, fact or circumstance, under application of Rule 5, was unjustifiable when considering the rights of any of the litigants here involved; but as to Colonel Potts its refusal constituted grave error which in and of itself amounted to a denial of due process of law as contemplated under Article XIV of the Constitution of the United States.

In the first place, the Court never should forget that the record definitely shows that Colonel Potts was not represented by counsel in this case. The nearest approach even to a claim to any representation by counsel in his behalf, if any, is summarized in the opinion of the Supreme Court itself found in the record at page 186, the court emphasizing that Colonel Potts had been in the regular Army years before the suit was filed, and that "by his own admission he relied upon his brother James to attend to matters pertaining to the plantation. In 1939 he joined in a verified motion for a continuance upon the ground alone that James was informed as to the details of this case and was too ill to appear as a witness." The point was stressed by the court as grounds for the assumption that Colonel Potts, if called as a witness, would afford little assistance in the defense of the case. As a matter of fact, the court knew that Colonel Potts was not represented by counsel in these proceedings and the court further knew that as early as June 1943 Colonel Potts had plead the statute here involved and that he had again claimed protection thereunder as late as November 1, 1947 (R. 47; R. 120).

The Court knew that Colonel Potts was relying upon the protection afforded him under this Act. It certainly would seem, therefore, that a final determination affecting the rights of the parties, including Colonel Potts, should not have been indulged without some assurance that Colonel Potts himself had been informed by the court that it was going to accept a deleted record because a motion had been made by counsel for his opponents under a sumptory rule of the court.

In the next place, we confidently submit that the Supreme Court of Arkansas was under no legal obligation to apply

Rule 5 when passing upon this case. The court had discretion in the matter, and this discretion should have been exercised in favor of Colonel Potts and his brothers.

And again the Court will observe that, aside from its general control of the record in the lower court after *certioraris* had been requested on behalf of the litigants, the Supreme Court of Arkansas itself in its order *per curiam* entered as late as October 18, 1948 (R. 182), permitted the full transcript to be filed, reserving all rights in the premises, however, until the cause was considered on its merits.

Again it is brought to the attention of the Court that the Arkansas court was not required to apply Rule 5 *mero motu*. Counsel for the opponents never so asserted but, to the contrary, counsel based its request upon a written motion found in the record (p. 169), which motion as urged *supra* itself failed to meet another rule of the Supreme Court of Arkansas, namely, Rule 3, which provided that all such motions in the Appellate Court must be supported by affidavit and proof of service on opposing counsel, neither of which requirements, as disclosed by the record, was complied with in this case.

Would it be facetious for us to suggest to the Court that in the present instance it would have been more becoming for counsel to have removed the beam from his own eye before attempting to find the mote in his brother's?

Finally, it will be remembered that Colonel Potts' application for relief in the present instance is directed to the action of the trial court in 1942-1943 and thereafter, while he was engaged in military service.

The order *per curiam* entered by the Supreme Court of Arkansas in this cause, on October 18, 1948, was clearly

an exercise of the court's discretion and expressly suspended the operation of its Rule 5 to meet the emergency which had been caused by the lower court in this case; and when the appellants (petitioners herein) had accepted and complied with said order and had filed their pleadings in full compliance therewith, the Supreme Court of Arkansas was estopped from receding from its said order *per curiam* after such compliance in good faith by the petitioners—and thereby deprived the petitioners of their rightful due process of law.

A copy of this brief was mailed to counsel for the respondents on October 14, 1949.

Respectfully submitted,

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Counsel for Petitioners.